No. 88-1378

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRANK MCNEIL, *et al.*,
Petitioners,
v.
SPRINGFIELD PARK DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE MEXICAN AMERICAN LEGAL DEFENSE FUND, THE SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, THE SOUTHERN REGIONAL COUNCIL, AND THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Mexican American Legal Defense & Educational Fund, the Southwest Voter Registration Education Project, the Southern Regional Council, and the Georgia Association of Black Elected Officials seek leave to file jointly the annexed brief as *amici curiae*. The petitioners have consented to the filing of this brief, but the respondent has not.

Each *amicus* has a long-standing interest in the voting rights of minority citizens and the protection of those rights under the Voting Rights Act of 1965. The Mexican American Legal Defense & Educational Fund ("MALDEF") is a national non-profit organization that promotes and protects the civil rights of Hispanics in the United States in the areas of political access, education,

nployment and immigration. As part of its efforts to ıcourage more effective political participation of Hisanics in the electoral processes of this country, MALDEF as provided legal representation to minority citizens in umerous voting rights cases, and currently has an ave docket of voting rights litigation.

The Southwest Voter Registration Education Project "SVREP") is a privately funded tax exempt organizaon which conducts voter registration drives and sponrs voting rights litigation in order to increase political articipation among minority citizens in the southwestern nited States. SVREP has sponsored many challenges discriminatory at-large electoral systems on behalf of inority citizens, and has an active interest in the interretation and enforcement of Section 2 of the Voting ights Act, 42 U.S.C. § 1973.

The Southern Regional Council is the South's oldest iracial organization that has worked for equal opporunity among all peoples of the region through advocacy, esearch, education and technical assistance. Since its eginning in 1944, the Council has had a consistent and rimary concern for the right to vote of all citizens in ıe region. In the 1960s, the Council created the Voter ducation Project as a means to carry out its work in ıe field of voting and continues to operate several projts carrying out research and technical assistance to the oting rights of all Southerners.

The Georgia Association of Black Elected Officials is n organization of over 500 black elected officials in the ate of Georgia. It is deeply concerned with the contining use in the state of election procedures that perpetate the effects of past discrimination in voting. The ssociation's members are acutely aware of the special arriers facing the minority community in electing candates of its choice to office, and the Association works promote the equal access of all citizens to full political articipation.

This case presents an important issue concerning the scope of Section 2 of the Voting Rights Act and the legal standards that should govern claims that at-large electoral systems unlawfully dilute the voting strength of minority citizens in contravention of Section 2. The Seventh Circuit's interpretation of Section 2 is being followed by other courts and threatens to limit the protections of Section 2 in a manner that will directly affect the black, Hispanic, Native American and other minority citizens represented by *amici*. Thus, the significance of the decision is not limited to the immediate facts of the case, but concerns minority citizens nationwide.

The annexed brief addresses the obstacles to full enforcement of Section 2 created by the interpretation announced by the Seventh Circuit, and urges that review be granted to resolve the manifest conflict between the Seventh Circuit's holding and the congressional intent behind amended Section 2.

WHEREFORE, *amici* respectfully move the Court for leave to file the attached brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

When minority citizens can demonstrate, in an action challenging a racially discriminatory at-large electoral scheme, that they could elect candidates of their choice in the absence of the at-large system through single-member district elections, are they nevertheless excluded from the protections of Section 2 of the Voting Rights Act solely because minority citizens would not constitute a majority of the voting age population in a proposed single-member district?

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BRIEF *AMICI CURIAE* OF THE MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, THE SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, THE SOUTHERN REGIONAL COUNCIL, AND THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* Mexican American Legal Defense & Educational Fund, the Southwest Voter Registration Education Project, the Southern Regional Council, and the Georgia Association of Black Elected Officials is set out in the motion for leave to file this brief which is appended hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether one of the general observations made in *Thornburg v. Gingles*, 478 U.S. 30 (1986), regarding vote dilution claims under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended, may properly be applied by the lower courts as a rigid and strictly numerical test requiring dismissal, without trial, of claims that are otherwise meritorious under the standards that Congress intended for evaluating Section 2 actions. *Amici* believe that the decision of the Court of Appeals for the Seventh Circuit,[1] and decisions by other lower courts that have addressed the issue, have limited the scope of Section 2 in a manner that directly conflicts with Congress' intent. The enforcement of a *per se* rule requiring minority voters in Section 2 cases to prove that they would constitute 50 percent of the voting age population in a proposed single-member district is totally unsupported by the language and legislative history of Section 2, conflicts with the reasoning of this Court's decision in *Thornburg v. Gingles*, and ignores other factors that would allow minority voters to elect candidates of their choice in a single-member district even though they do not constitute a majority of the voting age population.

Because this case presents a critically important issue that has arisen in a number of Section 2 cases, and because there is disagreement among the lower courts on this issue, this Court should grant certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

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[1] *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988) (printed in Appendix to Petition for Writ of Certiorari, pp. 1a-21a).

ARGUMENT

THE SEVENTH CIRCUIT'S RULE REQUIRING DISMISSAL OF A SECTION 2 CLAIM WITHOUT A TRIAL, SOLELY ON THE GROUND THAT MINORITY CITIZENS WILL CONSTITUTE SLIGHTLY LESS THAN A MAJORITY OF THE VOTING AGE POPULATION UNDER A PROPOSED REMEDIAL PLAN, CONFLICTS WITH THE CONGRESSIONAL INTENT BEHIND SECTION 2 AND WILL INHIBIT FULL ENFORCEMENT OF THE VOTING RIGHTS ACT.

The Voting Rights Act Amendments of 1982 were preceded by extensive Congressional hearings and detailed consideration by the House and Senate Committees on the Judiciary and their responsible subcommittees. *See* Senate Report No. 97-417, 97th Cong., 2d Sess., at pp. 3-4 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177 (hereafter, "S. Rep." or "Senate Report"). The Senate Report accompanying the legislation, which surveyed the legislative record and contained a lengthy analysis of each of the proposed amendments, including the amendment to Section 2, constitutes "the statement for the record of the intended meaning and operation of this bill." *Id.* at 1. *See also Thornburg v. Gingles*, 478 U.S. at 43 n.7 (noting that Senate Report is authoritative source for interpretation of amended Section 2).

The Senate Report discussed at length the history of litigation under Section 2 since its enactment in 1965, and recognized that courts would continue to be called upon to apply amended Section 2 in a wide variety of factual settings. S. Rep. at 19-24, 27-29. Taking into account the diversity of electoral systems and practices that could result in the submergence of the voting rights of minority citizens, amended Section 2 prescribed a "totality of circumstances" standard, and the Senate Report spelled out a broad array of factors that would

be relevant in determining whether a particular electoral system violates the rights secured by Section 2.[2]

While the factors identified in the Senate Report are an important expression of the congressional intent behind amended Section 2, equally important is the Senate Report's repeated emphasis that no one factor or set of factors should be treated as talismanic in analyzing a claim of vote dilution. As the Senate Report states:

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a

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[2] The "typical factors" listed in the Senate Report include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. at 28-29 (footnotes omitted). The Senate Report also notes two additional factors that cases prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), had occasionally considered as well: whether elected officials have been unresponsive to the needs of the minority group, and whether the state or local policy underlying the use of the challenged electoral device is tenuous. *Id.* at 29 (footnotes omitted).

> mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* [*v. Dorsey*, 379 U.S. 433 (1965)] and *Burns* [*v. Richardson*, 384 U.S. 73 (1966)], "minimized or cancelled out."

S. Rep. at 29 n.118. The Senate Report further emphasizes that "[t]he [pre-*Bolden*] cases demonstrate, and the Committee intends[,] that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. at 29.

In this case, however, the Court of Appeals for the Seventh Circuit held that a claim of unlawful vote dilution under Section 2 may never survive summary judgment, regardless of the facts and evidence supporting the claim, if minority voters will not constitute more than 50 percent of the voting age population in one or more single-member districts proposed as a remedy for the Section 2 violation. The Seventh Circuit's decision thus abandons the "searching practical evaluation of the 'past and present reality'" intended by Congress in amending Section 2, *see* S.Rep. at 30 (footnote omitted), *quoting White v. Regester*, 412 U.S. 755, 770 (1973), and substitutes a mechanical formula designed to promote "judicial economy" in disposing of voting rights claims. Appendix to Petition for Certiorari at 11a; 851 F.2d at 943. As the court of appeals acknowledged, the single factor it employed to deny petitioners a trial does not even appear among the factors discussed in the Senate Report and was not a part of the pre-*Bolden* case law which Congress codified in amending Section 2.[3] App. at 6a-7a; 851 F.2d at 941.

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[3] Indeed, in a pre-1982 case involving an at-large electoral scheme under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a *per*

There is disagreement among the lower federal courts on whether the absence of a 50 percent voting age population is an absolute bar to a Section 2 claim. While some lower courts have rejected such a strict numerical test as a *per se* requirement under Section 2, *see East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988), other courts have held, like the Seventh Circuit, that a voting-age population majority is an absolute precondition to a Section 2 claim. *See* cases cited at pp. 19-20 of the Petition for Writ of Certiorari. Proper resolution of the issue presented in this case is therefore crucial to the vindication of the rights of minority citizens throughout the country.

While the Seventh Circuit relied upon a statement in *Gingles* for the result it reached, *Gingles* does not require the dramatic departure from the language and intent of

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se majority-population requirement was rejected. *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171 (D.D.C.) (three-judge court), *aff'd*, 439 U.S. 999 (1978). *Wilkes County* held that a change to an at-large electoral scheme would have a racially discriminatory effect even though blacks did not comprise a majority of the voting age population in any of the single-member districts from which representatives were previously elected. Because *Wilkes County* was an action under Section 5, which requires covered localities to obtain preclearance of electoral changes, the effect of the court's decision rejecting the at-large system was to leave in place the previous single-member districts (although the court noted that the districts were malapportioned and that reapportionment might result in a majority-black district). The *Wilkes County* court specifically rejected the argument that black voters' failure to constitute a majority in the single-member districts meant they would not be harmed by an at-large system. 450 F. Supp. at 1176. *See also Major v. Treen*, 574 F. Supp. 325, 330-336, 351-352 (E.D. La. 1983) (three-judge court) (legislature's rejection of reapportionment plan that would have created a district with a 54 percent black total population and a 43.5 percent black registered voter population, in favor of a plan with only a 37.8 percent black registered voter population, violated amended Section 2; court credited evidence that voting patterns prevalent in New Orleans could allow black voters an effective role if the rejected plan were adopted, even though blacks would constitute only 43.5 percent of the registered voters).

Section 2 which the Seventh Circuit's decision entails. The court of appeals' error lies in its failure to give any weight to this Court's explanation of the purpose of considering the size and geographical compactness of the minority population. An inquiry into these facts, as this Court carefully explained, was relevant because "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17 (emphasis in original).

Thus, consideration of the size and compactness of the minority population was not mandated in *Gingles* as an end in itself, but was identified as a relevant circumstance only because of the necessity of establishing a relationship between the challenged electoral system and the minority group's inability to elect representatives. Where the potential remedy proposed by plaintiffs will, as a factual matter, allow them to elect representatives of their choice, the element with which this portion of *Gingles* was concerned is fully satisfied.

An "intensely local appraisal" [4] of the facts of a particular case may well reveal a variety of factors that would allow minority voters to elect candidates of their choice in a single-member district system, despite the lack of a voting age population majority. For example, in jurisdictions where the Democratic primary generally determines the outcome of the general election, and a greater percentage of blacks than whites are registered Democrats, an absolute voting age black majority may not be necessary to allow black electoral success in a single-member district. Other factors may include the presence of some white cross-over voting for minority candidates, the lack of a majority vote requirement, disproportionately lower white voter registration and/or

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[4] *Gingles*, 478 U.S. at 79, *quoting Rogers v. Lodge*, 458 U.S. 613, 622 (1982).

turnout rates, or a relatively high degree of political organization in the minority community.

Rather than examining such facts before affirming the grant of summary judgment, the court of appeals in this case specifically held that such evidence is irrelevant, and may not be considered, if plaintiffs fail to meet the strictly numerical 50 percent voting age population threshold. Thus, the court of appeals stated that "[b]ecause of [our] holding, *we do not consider* plaintiffs' claim that white cross-over votes would enable black candidates to prevail in the proposed districts." App. at 11a n.9; 851 F.2d at 943 n.9 (emphasis supplied). The court also declined to give any weight to the fact that, unlike the elections at issue in *Gingles*, the Springfield Park District elections could be won with a plurality, rather than a majority, of the vote.

Neither this Court nor Congress intended to confine analysis of Section 2 violations within the straitjacket created by the Seventh Circuit's decision. As this Court recognized in explaining why the "clearly erroneous" standard of Fed. R. Civ. P. 52 is applicable to factual findings in Section 2 cases:

> As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" S Rep 30 (footnote omitted), whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " *Rogers* [*v. Lodge*, 458 U.S. 613 (1982)] at 621, *quoting Nevett v. Sides*, 571 F.2d 209, 224 (5th Cir. 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. [*Rogers*,] 458 U.S., at 622.

478 U.S. at 79.

The conflict between the Seventh Circuit's ruling and Congress' clearly expressed intent warrants review by this Court to clarify its holding in *Gingles* and to forestall the further erosion of Section 2's broad scope through the application of rigid tests not required by the statute. Indeed, the necessity of review by this Court is underscored by other lower court decisions that have embarked on the perilous course of creating abstract "tests", further and further removed from the Senate Report factors and the rationale of this Court's decision in *Gingles*, for evaluating Section 2 claims. *See, e.g., Solomon v. Liberty County, Florida*, No. 87-3406 (11th Cir. December 12, 1988), slip op. at 7 (establishing a four-part test which is not mentioned in the language of Section 2, in the Senate Report, or in *Gingles*, but which the Eleventh Circuit believes should be followed by district courts in order to satisfy the "three elements of the *Gingles* gloss", which are in turn deemed a gloss on the totality-of-circumstances standard intended by Congress).[5] The crucial role played by amended Section 2 in securing minority citizens' right to full political participation must not be curtailed through unwarranted limits on the fact-intensive inquiry prescribed by Congress for vote dilution suits.

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[5] The "four-question method of analysis," slip op. at 11, that district courts in the Eleventh Circuit must now use is as follows:

> (1) Is the minority group significantly underrepresented in proportion to its percentage of the total electorate? (2) If so, could the minority group achieve roughly proportional representation but for the multimember electoral system? (3) If so, can the minority group establish that the discriminatory effect of the challenged electoral system is driven by racial bias in the community or its political system? (4) If so, can the minority group establish that such bias will continue to prevent the minority group from having equal access to the political process?

Slip op. at 7. This four-part test is restated in slightly different language at slip op., 10-11.

CONCLUSION

The petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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